No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

GEORGE J. TICHY
Attorney for Respondent

West 721 Second Avenue
Spokane, Washington 99204

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

GEORGE J. TICHY
Attorney for Respondent

West 721 Second Avenue
Spokane, Washington 99204

INDEX

AUTHORITIES CITED

Table of Cases:

AUTHORITIES CITED (continued)

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT, C & C PLYWOOD CORPORATION

The Respondent, C & C Plywood Corporation, herewith respectfully submits its Brief on the Merits in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 105-112) is officially reported at 351 F. 2d 224. The decision and order of the National Labor Relations Board (R. 95-103) is reported at 148 NLRB 414. The decision of the Trial Examiner is set forth in the Transcript of Record at pp. 81-94.

JURISDICTION

This matter arises out of an allegation of unfair labor practices made to the National Labor Relations Board

which is wholly and entirely dependent upon placing an interpretation on a provision of an existing, valid and binding collective bargaining agreement. The Board placed a strained interpretation upon the contractual provision, asserting that it did not afford a basis for the action taken by the Respondent Employer and that the Board therefor had jurisdiction. The Court of Appeals herein held "that the Board has no jurisdiction to adjudge an unfair labor practice where 'the existence of an unfair labor practice . . . is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract.'" (351 F. 2d 224, 227) Of course, this Court has jurisdiction over the National Labor Relations Board under section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 160(e) and over the Courts of Appeal both under the foregoing Act and under its general supervision of the Courts of Appeal. (62 Stat. 928, 28 U.S.C. 1254)

QUESTION PRESENTED

Does the National Labor Relations Board have jurisdiction to adjudicate an unfair labor practice when its only basis for doing so is to interpret and construe a collective bargaining agreement between the parties which agreement (neither contrary to public policy or the National Labor Relations Act, as amended) reasonably and arguably authorizes and permits the conduct deemed violative of the Act by the Board?

STATUTES INVOLVED

The Brief of the National Labor Relations Board incorporates within its Appendix (at pages 31-34) Sections

7, 8(a) (1) and (5), 8(d), 9(a) and 10(a) of the National Labor Relations Act. (49 Stat. 499), as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. 151 *et seq.*), and Sections 203(d) and 301(a) of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) In addition to those statutory provisions excerpts from Section 10(b), (c) and (e) of the National Labor Relations Act, as amended, *supra*, and Section 201(a), (b) and (c), 203(c) and Section 204(a) of the Labor-Management Relations Act, *supra*, are also deemed relevant and the specific terms of these provisions are incorporated in the Appendix, *infra*, pp. 79.

STATEMENT OF THE CASE

I. INTRODUCTION.

The C & C Plywood Corporation, the Respondent herein, is a manufacturer of plywood located near Kalispell, Montana. Its production and maintenance employees, together with those of another employer deemed to be a joint employer by the Labor Board, were, at all times pertinent to these proceedings, represented by Plywood, Lumber & Sawmill Workers Local Union No. 2405 hereinafter called the "Union." The collective bargaining unit during the period involved in this matter included from 181 to 201 employees. (R. 16)

The pertinent portions of the Complaint filed by the Labor Board against the Respondent are:

> "8. Since on or about May 20, 1963, without consulting the Union, Respondent unilaterally, and over the objection of said Union, instituted a group wage incentive plan covering approximately one-fourth of the employees in the appropriate unit.

"9. Since on or about May 20, 1963, and at all times thereafter, Respondent has refused upon demand made by the Union, and continues to refuse to bargain collectively with the Union over the group wage incentive plan." (R. 2)

The pertinent portions of the Answer filed by the Respondent are:

"On May 20, 1963, the Employer herein, pursuant to the provisions of the collective bargaining agreement, executed under date of May 1, 1963, posted a notice a copy of which is attached hereto and marked as Employer's Exhibit No. 1 and made a part hereof as if fully set out hereat.[1] Thereafter, and on June 7, 1963, and July 15, 1963, the Employer met with representatives of the Union and fully discussed and negotiated with the Union herein involved in good faith regarding the notice hercin referred to and its contents. Except as herein stated, the Employer denies each, every and all of the allegations of paragraphs numbered 8., 9., 10., 11., and 12. of the Complaint." (R. 5)

II. COLLECTIVE BARGAINING CONSUMMATED IN AGREEMENT.

A. The Section upon which Respondent Relies.

The Respondent and the Union entered into a written collective bargaining agreement on May 1, 1963, which was the fruit of eleven negotiating sessions, the last two of which were held on March 12 and April 19, 1963. (R. 12, 14; G.C. Ex. 2, R. 61)[2] The section of the Working Agree-

---

[1]A copy of the notice the Respondent posted which gives rise to this controversy is reprinted at R. 6, 73.

[2]General Counsel's Exhibits are cited "G. C. Ex." and Respondent Employer's Exhibits are cited "Empl. Ex." each followed by the number of the exhibit. Exhibits are found at R. 61-80.

ment dealing with the subject of wages and wage rates was agreed upon during a negotiation session prior to the March 12 meeting. (R. 43-44) It was referred to and considered by the parties at the March 12 meeting in a context important to a complete understanding of the chronology of events involved here. Since the clause was agreed upon previously there appeared no reason to the employer negotiating committee to discuss its future application at this meeting. The section agreed upon and subsequently included in the written contract is as follows:

> "A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. *The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee on the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this agreement." (Emphasis supplied; G.C. Ex. 2, Article XVII, R. 67-68)

B. Respondent Advises Union Premium Pay Plan Contemplated.

With the emphasized portion of the above quoted excerpt of the agreed upon wage clause in mind, particularly in view of the interpretation placed upon substantially identical language in other labor contracts in the area with unions sister to the one here involved (hereinafter developed at p. 7), the Respondent, through Mr. Thomason,

its General Manager, advised the Union's negotiators at the March 12 meeting that the Respondent was studying a premium or incentive pay plan with respect to those it employed on its glue spreader crews. (R. 43-44, 52-53) Mr. Dexter L. Bright, a staff representative of the Timber Products Manufacturers Association who assisted Mr. Thomason in negotiations, made extensive notes as the events occurred in the negotiating sessions. He verified, both through his personal recollection and by way of his notes taken simultaneously with the event, that Mr. Thomason advised the Union negotiating committee at the March 12 meeting that he contemplated establishing a premium or incentive pay plan to apply to the glue spreader crews under the provisions of the already agreed upon wage clause. (R. 52-57) The Union representatives present at negotiations recall that the Respondent did discuss its intention of putting a premium pay plan into effect with respect to the glue spreader crews. (R. 9, 12)

At the March 12 meeting negotiations had reached a point where but two issues remained to be resolved by the parties: (1) the request of the Union for a contractual provision that all employees would be required to become and remain members of the Union as a condition of continued employment (union shop or union security); and, (2) a pay schedule for the glue spreader crews. (R. 43-44, 49) All other matters which subsequently made up the Working Agreement signed on May 1, 1963, had been tentatively agreed upon prior to the March 12 meeting and were ultimately included in that Working Agreement.

Specifically, in recording the events as they occurred at the March 12 meeting, Mr. Bright wrote in his notes:

> "Company position unchanged. Company is working on an incentive plan for spreader crews under premium clause."

These notes were taken as the event occurred and were recorded at the time that the Union and Company negotiators were in joint session conducted under the chairmanship of a Federal Mediator. (R. 56)

C. Substantially Identical Provisions Found in Labor Contracts of Sister Unions in Immediate Area.

That portion of Section A of Article XVII of the Working Agreement, upon which the Respondent relies, is virtually identical to the provisions found in wage clauses of other labor contracts existing between sister Montana unions to the Union here involved and Montana timber manufacturers. Mr. Robert C. Weller is business agent and a negotiator for these sister unions as well as this Union. (R. 14-15) Mr. Weller represented the Union here involved in the negotiations with the Respondent. (R. 8-16) These basically identical provisions in other working agreements had been in effect long before the comparable agreement between this Employer and Union so that there was considerable experience as to interpretation placed upon this provision by sister unions and timber products employers. These "premium pay" provisions and the experience that had been developed under them was made known to Mr. Thomason, the Respondent's General Manager, by Mr. Bright who assisted him in these negotiations. (R. 46-47, 53-55, 58)

A plan very comparable to that effectuated by the Respondent was in existence for some time at the Mount Lolo Lumber Company in Missoula, Montana, under a very similar contract provision. About the only essential difference at Mount Lolo was that the provision did not permit the Company to reduce the premium pay for an individual once it was established. The provision in the Mount Lolo agreement follows:

> "Nothing in this agreement shall be construed as to prevent the Employer from voluntarily advancing any wage rate or scale; but the advance of any individual rate or scale to reward a particular employee for some special fitness, skill, aptitude, or the like, shall not be considered a permanent increase in the rate or scale of that position after it has been vacated by a particular individual to whom the increase was granted." (R. 57)

The plan existing under this provision at Mount Lolo was applied to crews of men occupied in working together as a team. There are as many as three such crews working under this arrangement at Mount Lolo at one time. Each crew consists of two men who are engaged in loading railroad cars with lumber products. (R. 58) The men never receive less than the hourly rate provided for in the collective bargaining agreement for their job classification. The Company did, however, institute a premium or incentive pay plan under the terms of the above-quoted agreement. Under this plan, each member of the loading crew receives a higher rate than provided for in the agreement when the car loading crew loads an average of over 40,000 board feet of lumber per day. Some crews make the premium while others do not. After the required footage is loaded within a workday, the premium is based on each

additional thousand board feet of lumber loaded in that day's time. (R. 53-55) The Union at Mount Lolo is Local Union No. 2685 of the Lumber and Sawmill Workers located in Missoula of which Mr. Weller is one of the Business Agents. (R. 15, 57)

Another firm and plan discussed by Mr. Bright with Mr. Thomason was the arrangement at the Stoltze Land and Lumber Company near Columbia Falls, Montana, just about ten miles from the Respondent's plant herein. There the contractual provision read as follows:

> "Nothing in this agreement shall be construed as to prevent the Employer from paying a premium rate in excess of the agreed upon minimum scale to reward special fitness, skill, aptitude or the like." (R. 59)

One of the premium pay arrangements in existence under this provision is a plan whereby the head sawyer receives an additional 25¢ per hour for each hour worked in a month in which he averages 80,000 board feet or more of production per workday. (R. 58)

D. The Grievance Procedure.

Included within the Working Agreement is a relatively comprehensive grievance procedure designed to resolve issues that arise between the parties under the Agreement. (G.C. Ex. 2, Working Agreement, Articles IV, V and VI, R. 63-66) In their collective bargaining the parties chose not to conclude the processing of grievances with compulsory arbitration.

III. THE INAUGURATION OF THE PREMIUM PAY PLAN.

The Working Agreement was signed by the Union and the Respondent on May 1, 1963. (G.C. Ex. 2, R. 61-70) Within that Agreement, as Section A of Article XVII, was included the provision upon which the Respondent rests its belief that it has properly interpreted and applied its contract with the Union and has neither breached the contract nor committed an unfair labor practice. The Respondent has acted reasonably, in complete good faith and with a total lack of anti-union animus.

Following the signing and ratification of the Working Agreement and in the normal course of events, the Respondent completed its studies aimed at developing a premium pay plan for the glue spreaders and on May 20, 1963, posted a notice on its bulletin boards entitled "Glue Spreader Crew Premium Pay." (R. 6, 73)

A careful analysis of the plan will illustrate that the members of the glue spreader crew can improve their pay rates, thus earning a premium over the contractually established minimum wage rate by producing in excess of a given norm. Once that norm has been exceeded, however, the single premium rate is attained and remains constant. The premium rate does not increase with any further increase in production. Under no circumstances does any employee receive less than the rate called for in the Working Agreement for his particular job. (R. 42-43)

The Respondent made no effort to hide this premium pay plan. It was posted on all bulletin boards and com-

municated to all affected employees. (R. 39-40) Respondent believed that it was embarking upon a course of conduct authorized and permitted by the Working Agreement.

Under date of May 27, 1963, the Union sent a letter to the Respondent requesting a meeting with the Respondent "for the purpose of discussing your notice of May 20, 1963, headed 'Glue Spreader Crew Premium Pay.'" (G.C. Ex. 4, R. 74) The Respondent promptly replied and proposed a meeting for June 7 which was held. At that meeting, at which other matters were discussed as well, the Union representatives demanded that the premium pay plan be rescinded. The Union representatives in the June 7 meeting insisted that the posted premium pay plan was not permissible under the terms of the contract. (R. 19) The Respondent's representatives explained that they believed that it had the right to establish and maintain this premium pay plan under the provisions of Article XVII of the Working Agreement and declined to discontinue the plan. (R. 44-45) A second meeting was requested by the Union to which the Respondent readily agreed. This meeting was held on July 15 and for all practical purposes was a repetition of the prior meeting in that the positions of the Respondent and the Union were restated. (R. 10-11, 13, 45) These were the only two meetings held in which the subject of the premium pay plan was discussed after its establishment and before these proceedings were initiated.

At no time, in either meeting, did the Union offer or request a discussion of the manner in which the plan operated nor did the Union seek to revise it. The Union posi-

tion was adamant, fixed and unequivocal that the plan be rescinded. The Company declined in each instance making it clear it was relying on paragraph A of Article XVII of the Working Agreement. The Union did not seek to bargain on the plan in any way. Nevertheless, the Respondent held itself in readiness to do so. (R. 11, 13, 19, 45, 48-49)

Experience under this premium pay plan with respect to all of the glue spreader crews both before and after the plan was inaugurated is tabulated in Employer's Exhibit No. 1. (R. 79-80) The Exhibit shows that the members of every crew have at least once, by application of special fitness, skill, aptitude and the like, qualified for the premium pay. Some crews have qualified many times. Inasmuch as newly hired men start on the swing shift, the members of those crews less frequently qualify for the premium pay. (R. 41)

The Respondent has made every effort to administer the premium pay plan reasonably, to insure, as nearly as possible, that outside factors would not impair the freedom of employees to exercise the special skills, fitnesses, aptitudes or the like essential to qualifying for the premium pay. No employees have been disciplined, discharged or reprimanded for failure to meet the standards set up in this premium pay arrangement. (R. 39-40) For example, members of the crew are not penalized for any failure to obtain materials because of a holdup in the usual flow of materials for which they are not responsible. The Respondent does not compute such lost time in determining the average footage required to obtain the premium pay. (R. 41-42; G.C. Ex. 3; R. 6, 73) The Respondent made it a point to divide

up the raw materials so that each group of men would have an equal opportunity to make the premium pay if they were otherwise capable and desirous of doing so. (R. 40-41)

IV. PREMIUM PAY PROVISION OF WORKING AGREEMENT CLEARLY APPLICABLE TO GLUE SPREADER CREWS.

A "special fitness, skill, aptitude or the like," as set forth in Section A. of Article XVII of the Working Agreement, is clearly necessary on the part of each of the individuals who makes up a glue spreader crew, if he is to qualify for the premium pay provided by the plan. To attain the prescribed norm a high degree of coordination among the members of the crew is essential and this can only be obtained when each member of the crew exhibits a "special fitness, skill, aptitude or the like." To comprehend this requires an understanding of the functions of the employees involved.

A glue spreader crew ordinarily consists of four employees. The first employee in the course of production is the Core Feeder. Core is customarily thin pieces of veneer four feet long of random widths which is laid with the grain at a right angle to the grain of the eight foot sheets of veneer. The core veneers come in loads to the Core Feeder. He quickly scans the pieces of core veneers on the load before him, and selects acceptable core from the load. He watches the Core Layer at every opportunity and at proper intervals, if he is exercising the fitness, skill, and aptitude necessary for a premium, he uses a specially recommended method to insert the core through a glue spreading machine which in turn mechanically spreads glue on the core. The

Core Layer works at a lower floor level behind the glue spreading machine. He quickly observes to be sure that the Sheet Turners have placed an eight foot long (by roughly four foot wide) sheet of veneer in the proper place so that he may lay the core as required. He receives the core as it is ejected out of the glue spreading machine. At this point the upper and lower surfaces of the core must be adequately spread with glue. He quickly inspects this, accepting or rejecting core for further use. He rapidly places the acceptable core veneers individually on the larger sheet of veneer in such a manner that: (1) no core is overlapped with another; (2) no excessive gaps or hollow places are created; (3) no extraneous matter has come between the core and the sheet below or above the core; (4) the core so covers the sheet below and above the core that the plywood ultimately manufactured may be trimmed and finished in such a manner that it is of adequate strength and surface with respect both to sheets and cores, to be a marketable product. Standing immediately behind and to the side of the Core Layer are two Sheet Turners.

The Sheet Turners select one or two sheets of the eight foot veneer and place them as tops and bottoms or as one of the center plies of the plywood. A single sheet of veneer is used as center ply and in this operation a single sheet is lifted into place by the sheet turners. The veneer forming the top of one panel of plywood is placed in position concurrently with the sheet of veneer forming the bottom ply of the next succeeding panel of plywood. These pieces of veneer do not adhere to each other because the glue is spread only on the cores. The adjacent dry surfaces thus separate one panel of plywood from its predecessor and

successor in the stack. Sheets of veneer must be evaluated quickly as to their quality as a face, bottom or center ply and accepted or discarded. The Sheet Turners jointly carry a single sheet or two sheets from loads adjacent to where the plywood is being built up. This requires carrying the sheet or sheets usually over the head of the Core Layer. Because veneer is very thin, a flexible but rupturable material, it must be handled with adeptness and care. Caution must be taken to prevent slivers, knots and other debris from the veneer from being interjected or permitted to remain between sheets or between sheets and core with resultant defective plywood panel or panels. It is not uncommon in this operation for one of the Sheet Turners and the Core Layer to trade jobs periodically during the day. Under these circumstances, sometimes the Sheet Turner who so rotates is also known as a Core Layer (rather than a Sheet Turner) and draws the Core Layer rate, absent qualifying for the premium pay. Under these circumstances the crew is then made up of a Core Feeder, two Core Layers, and one Sheet Turner.

Many of the elements of "special fitness, skill, aptitude or the like" involved in each of these specific jobs are obvious by the very functions and responsibilities of these interdependent jobs. However, the specific points at which the particular employee must evidence "some special fitness, skill, aptitude, or the like" may be summarized as follows:

For the Core Feeder:

— Requires extra coordination;

— Requires an aptitude for feeding core through the glue spreader machine with both hands, independent of each other;

— Requires a quick and thoroughly observant eye and other skills, fitnesses and aptitudes involved in grading the rough core before it is used or discarded;
— Requires constant watching of the Core Layer in a sense of extremely close coordination to work with him to feed through that portion of the glue spreader machine handiest to the Core Layer;
— To see end of panel being made up so as to feed only the proper amount of core;
— To see end of panel being made up so as to feed only the proper width of core;
— To see end of panel being made up so as to stop feeding core until back, face or center plies are placed on panel being made up;
— To feed core only as fast as the Core Layer can handle it;
— Requires putting only one piece of core through glue spreading machine at a time;
— Requires selecting proper core widths to make up a panel so that unnecessary waste is avoided or a shortage is not encountered;
— Requires constant watching of the top roll of the glue spreading machine for observance of proper glue texture, that it is spreading glue properly, that nothing is sticking to that roll or that the roll has not become damaged or ineffective which might impair its proper functioning, etc. (R. 27-31, 34)

For the Core Layer:

— Requires extra coordination;
— Requires laying core stock side by side rapidly;
— Requires that gaps or hollow places in laying core stock be avoided;
— Requires that laps in laying core stock be avoided;
— Requires quick grading of stock as received (if damaged in going through the rolls of the glue spreading machine or graded in error by the Core Feeder, core must not be used);
— Requires constant watching of lower roll of glue spreading machine for observance of proper glue

texture, to ascertain that it is spreading glue properly, to make sure that nothing is sticking to that roll or that the roll has not become damaged or ineffective which might impair the proper functioning, etc.;

— Requires watching the thickness of the veneer to insure uniformity;

— Requires that he check to be sure that glue is spread evenly and fully on both sides of every piece of core;

— Requires constant alertness that no foreign matter comes between plies of panels as these are made up;

— Requires agile movements of the body, as he must bend quickly out of the way as the two men acting as Sheet Turners place the backs, faces and center plies (4 foot by 8 foot sheets) of veneer on the batch being made up;

— Requires adept handling of core which is spread with glue on both sides and is quite slippery and difficult to catch, handle and lay in proper position. (R. 31-34, 49)

For the two acting as Sheet Turners:

— Requires that each Sheet Turner grade out the 4 foot by 8 foot sheets of veneer used as backs, faces or center plies. Requires watching for feathering, thickness, loose knots, slivers, etc.;

— Requires proper preparation and matching of sheets before placing them on batch being made up;

— Requires careful examination of every 4 foot by 8 foot sheet to be sure that there is at least one straight 8 foot edge and that it is placed properly against the back board upon which the plywood panels are being built up;

— Requires individual and joint physical coordination between themselves and the Core Layer;

— Requires that men work well together;

— Requires that men place veneer sheets on their proper side against the glue and away from the glue to obtain maximum values from each sheet of veneer;

— Requires that work be accomplished so that these

large and very thin sheets of veneer are not torn, ripped or broken;

— Requires that the number of panels of rough plywood made up be counted accurately for inventory and for placing of separator panels at predetermined places;

— Requires that batch tickets be made up accurately;

— Requires removal of loose knots, slivers or splinters that may accumulate between sheets of veneer;

— Requires that these men adeptly carry the 4 foot by 8 foot veneer panels over the head of the Core Layer without hitting him or damaging, ripping, tearing or harming the material and then placing it so that no damage comes to the materials and that no foreign matter is placed between the materials;

— Requires one Sheet Turner rotate with the Core Layer periodically so that one Sheet Turner must also be adept as a Core Layer. (R. 35-37, 49)

Almost every function enumerated must be performed quickly, agilely, and with a reasonable degree of expertise if an employee is to qualify for premium pay.

Attention is also directed to the contractual wage scale which shows two of these three jobs to be the highest paid among all production jobs. The third is scheduled at almost the next highest contract wage rate. (G.C. Ex. 2, R. 71)

Mr. Thomason, Respondent's General Manager, a man of fourteen years experience in the plywood industry, and one who has performed work personally on a glue spreader crew, is a fully qualified expert on this activity. He testified that the above enumerated special fitnesses, skills, aptitudes and the like are necessary for any employees in the glue spreader crew to qualify for the premium pay under the premium pay plan. (R. 24, 31, 34, 37)

V. THE TRIAL EXAMINER'S DECISION.

The Trial Examiner, after hearing and reviewing the proceedings conducted before him and considering the arguments made at the hearing and by briefs, found as his third Conclusion of Law as follows:

> "3. Respondent did not, through management's promulgation of a premium pay plan for glue spreader crew workers prior to consultation with Union representatives, or through its refusal to rescind the plan upon Union demand, refuse to bargain with the Charging Party, within the meaning of Section 8(a) (5) of the Act, as amended; nor has Respondent, thereby interfered with, restrained or coerced employees in their exercise of rights statutorily guaranteed, within the meaning of Section 8(a) (1) of the Act." (R. 94)

The Trial Examiner then went on to hold:

> "Upon these findings of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety." (R. 94)

Significant findings of fact by the Trial Examiner include these:

> "Substantially, therefore, this case reflects a dispute with respect to the scope of Respondent's contractually-reserved right to pay a premium rate conditioned upon the firm's desire to reward particular workers possessed of certain qualifications. General Counsel's complaint charges no statutory violation severable from this dispute between Respondent and the Charging Party [the Union], derived entirely from their conflicting contract interpretations.
>
> "(Respondent is charged, merely, with unilaterally promulgating a group wage incentive plan, without prior consultation and despite Union objections. Re-

spondent contends, precisely, that management was free to take such concededly unilateral action without prior consultation, pursuant to its contractually-reserved right to pay premium rates for specifically designated purposes.)

"Certainly, these disparate contentions—with respect to the type of wage rate revision which the contract permitted—reveal that the general 'wage' provision in question cannot, really, be considered sufficiently clear, in this particular regard, to forestall disputes regarding its scope. Despite a contrary contention by General Counsel and the Charging Party's representative, no persuasive demonstration has been proffered that Respondent's management—when it promulgated the disputed premium pay plan for glue spreader crew members—was acting in bad faith." (R. 91-92)

"General Manager Thomason's decision—so far as the record shows—was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 112 NLRB 779. The Board's decision in the cited case—with respect to circumstances substantially comparable—declared that:

"Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.' (Citing cases).

"In this connection, further see *Morton Salt Company*, 119 NLRB 1402, wherein the Board—albeit in a case which did not involve a refusal to bargain—reached a comparable conclusion. Without passing

upon Respondent's other contentions, I find these considerations dispositive of this case." (R. 92-93)

The foregoing disposed of paragraph 8 of the Complaint. Dealing with paragraph 9 of the Complaint, the Trial Examiner stated:

> "Within his complaint, General Counsel has charged Respondent with a further refusal, upon Union demand, to bargain collectively regarding the newly promulgated group wage incentive plan. With matters in their present posture, however, this contention cannot be sustained. Though Respondent's management, clearly refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore, Respondent cannot be found in default—upon this ground either—with respect to its statutory obligation to bargain." (R. 93)

VI. THE DECISION OF THE BOARD.

The Board reasoned that it has the right to interpret and construe collective bargaining agreements simply because it is necessary for it to do so in applying certain portions of the Act, namely for determining whether a contract is a bar to a representation matter, union security provisions, or Section 8(e) matters. It also observed that there was neither litigation before a court nor an arbitrator and that the labor agreement did not include a provision for arbitration. Thus having established, in its estimate, its right to construe the contract, and having found that neither the

events leading up to the agreement nor the provisions of it established a "waiver" on the part of the Union and having further found that the language of the contract was "so contrary to labor relations experience," the Board then concluded that the language involved was inapplicable to the premium pay plan established by the Respondent Employer. The Board thereupon ruled that the Respondent had engaged in unfair labor practices. (R. 95-101) One member of the Board dissented. He observed that this decision was decided by the wrong forum, and that it was a departure from valid precedent and from a long-standing and salutory rule of the Board. (R. 102)

VII. THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals properly distinguishes this matter from prior decisions in which the Board was called upon to interpret a labor agreement in the following passages:

> "Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already 'imposed directly by the Act,' irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.
>
> "The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties

have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*,[3] the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is 'dependent upon the resolution of a preliminary dispute involving *only* the interpretation of the contract.' • • •" (*National Labor Relations Board v. C & C Plywood Corporation*, 351 F. 2d 224, 227; R. 110-111)

[3] *Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (C. A. 9, 1964)

ARGUMENT

I. SUMMARY OF RESPONDENT'S ARGUMENT

The Respondent Employer's argument has two separate facets: A. The National Labor Relations Board, herein called the Labor Board or the Board, is without authority to construe, interpret or administer labor agreements as a normal or usual practice and it may not find an unfair labor practice where the threshold question is dependent upon an interpretation of a contractual provision; and, B. If this Court should decide that the Board does have that authority, the interpretation here made was not valid or reasonable and such construction should be set aside.

A. The Board Lacks Authority to Interpret, Construe or Administer Labor Agreements.

The Labor Board does not have the right, as a normal and usual matter, to interpret, construe or administer collective bargaining agreements. Any rights that it has in this area are limited to those specifically given to it under the National Labor Relations Act, as amended, from which the Board derives all of its powers.

The Congress has made it clear, not only through its long and articulate legislative history but by the terms of the Act itself that collective bargaining of employers and representatives of employees is to be nurtured and encouraged, not frustrated. This is evidenced by the fact that the Senate would have (through the insertion of a proviso making the breach of a contract and other agreements an unfair labor practice[4]) given the Board broad authority

---

[4]S. 1126 and H. R. 3020 as amended and passed by the Senate, 80th Cong., 1st Sess. Secs. 8(a) (6) and 8(b) (5).

to interpret, construe and administer labor contracts but in the last analysis withdrew this authority. This view is supported by the Congressional debates which indicate the great concern of the legislators not to overburden the Board or cause its caseload to become too great. Congress was satisfied that the parties to a dispute over an interpretation to a collective bargaining agreement had adequate and prompt remedies: (1) under the provisions of the newly adopted Section 301; (2) under the already established jurisdiction of State courts or other State bodies; (3) Federal and State facilities for mediation; (4) final and binding arbitration whether set forth in the agreement of the parties or accepted on an *ad hoc* basis; and, (5) collective bargaining as such.

Congress was straight-forward in its admonition that collective bargaining was the desired ultimate objective of this legislation and made it manifest that bargaining should be given free play. The Findings and Policies of the National Labor Relations Act as amended (Sec. 1), and particularly the limitations which Section 8(d) of that Act placed upon the scope of the Board's authority to find that a refusal-to-bargain-collectively constitutes an unfair labor practice, together with the establishment of an independent mediation agency in Title II of the Labor-Management Relations Act, 1947 support the thesis that the Board is not to have general, broad authority to interpret, construe or administer collective bargaining agreements. The Congress opposed compulsory arbitration of labor disputes and the Board's conduct in this matter is tantamount to compulsory arbitration.

The fact that the same question was not pending before a Court, an arbitrator or any other forum, did not, as the Board implies, give rise to authority within the Board to install itself in the gap which it imagines to exist. The Board's jurisdiction does not arise simply because it believes it administers speedy justice or because the contractual interpretation involved was a simple matter. While other forums may have concurrent jurisdiction over the same factual situation with the Board as indicated in Section 10(a) of the National Labor Relations Act, as amended, the converse does not follow. The Board is limited by statutory authority. The limitations placed upon other forums arise out of other and different considerations.

The Board's own precedents which go back well over twenty-five years do not support its decision in this matter. It is creating by its own current decisions a conflict in administration of the Act by not uniformly pursuing the same course in comparable factual situations. The law the Board administers has not changed, although the Board's personnel has. The Board's function is to administer the statute involved, not the labor agreement of the parties.

B. The Board's Contractual Interpretation is not Valid.

Should this Court find that the Board was within its authority to interpret the labor contract of the parties, that interpretation was unsound, improper and indefensible. The interpretation substitutes an "expertise" the Board does not have for any evidence or testimony which should be in the record. As a consequence, the Board's decision

cannot be sustained either under the provisions of the National Labor Relations Act, as amended, or under the decisions of this Court.[5]

The interpretation placed upon the language of the contract denies the common usage of the terms employed as evidenced by the dictionary meaning of the words involved as well as the use put to these words in other area and industry agreements involving sister unions to the one here involved.

The language of the contract interpreted is not ambiguous and applies to the purpose to which the Respondent Employer put it. The Employer was provided with a reserved right in the area of wage payment and standards.

The bargaining agency of the Union was in no manner defeated since the premium pay plan installed by the Respondent Employer did not in any manner cut the wages of the employees or thwart the agreement made by the Union. The employees involved were in no event to receive less than the hourly rate agreed upon and there was no compulsion placed upon the employees to meet the norm established nor were any employees reprimanded or penalized for failure to satisfy that norm.

In contract interpretation, language is not the sole consideration. Area and industry practices are to be considered. In this matter other timber products firms in the area and industry had comparable provisions which were

---

[5] *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474 (1951) and Secs. 10(b), (c) and (e) of the National Labor Relations Act, as amended.

interpreted and applied to situations so nearly parallel to the one at hand that any reasonable person would believe the action taken by this Respondent Employer was covered by the language of this labor agreement.

In substituting its questioned "expertness" for the language of the agreement, the Board did not have any evidence or testimony that confirmed or corroborated its conclusion. Instead it appears to have relied upon what it deemed best for the Union without regard to its prior agreement and the conditions and practices in labor relations in the State of Montana, the Pacific Northwest or the timber products industry. It is to be noted that this area and industry does not subscribe to certain concepts of industrial relations sometimes found prevelant elsewhere in the nation, such as, for example, final and binding arbitration set down within the contract to be the final step in contract interpretation (as distinguished from *ad hoc* arbitration). Moreover, there is no concerted refusal in this region or industry to utilize premium pay and related incentives for the purpose of improving productivity and employee performance.

II. A CRITICAL ANALYSIS OF THE BOARD DECISION.

In its decision the Board set aside the agreement of the parties which had been made in the usual course of collective bargaining, stating in substance, that the agreement did not authorize or excuse an act which absent such agreement was *per se* an unfair labor practice. The Respondent Employer set up as its defense that the language of the agreement entered into authorized and permitted

the act forming the basis of the complaint.[6] Our national public policy and law encourages, not forbids, the parties to enter into an agreement "in respect to rates of pay, wages, hours of employment, or other conditions of employment."[7] Such agreements are not to be equated with ordinary contracts nor are such agreements to be interpreted in a highly restrictive manner.[8] The provision here involved was a reserved right, that is, the Respondent Employer sought to reserve unto itself those rights it would have had absent the statute, and the Union by its agreement concured. That is why it was written in the language:

---

[6]The pertinent allegations of the Complaint are recited at pp. 3-4, *supra*. The Board found that the Respondent Employer had made two defenses, one alleging that by the conduct of the parties during negotiations the Union had waived its statutory rights and the second based upon the language of the contract in Article XVII. The Board has erred in this analysis. The Respondent Employer has relied exclusively upon the language of the labor agreement for its defense. While it does not believe that language to be ambiguous and in need of parole evidence to understand or interpret it, it did introduce testimony to show that the common usage of the language employed as evidenced by its dictionary meaning, as evidenced by the use put to substantially equivalent language in labor agreements between sister unions and neighboring employers and the fact that the Union was put on notice as to the intended purpose and use of the language, all supported the course of conduct undertaken by it. Further, the Respondent Employer pointed out that there was not one iota of evidence or testimony to indicate that the Respondent did not act in complete good faith and in the honest and reasonable belief that it could do that which it did.

[7]See Findings and Policies of National Labor Relations Act, as amended, Sec. 1, as well as Secs. 8(d) and 9(a) of that Act and Secs. 201 and 204(a) of the Labor Management Relations Act, 1947.

[8]*United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U. S. 574, 578-9 (1960) wherein Justice Douglas observed: "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract: it is a *generalized* code to govern a myriad of cases which the draftsman cannot wholly anticipate.*** The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law *of a particular industry* or of a particular plant." (Emphasis supplied.)

"The Employer reserves the right * * *."[9] Further, the language used by the parties, when taken either at face value or in light of common usage either delineated by area and industry practice or the common dictionary meaning, clearly supports the conduct of the Respondent Employer. Instead, however, the Board embarks upon a novel and jejune course disregarding the clear import of the language used, substituting its own unique interpretation.

The Board proceeded to do this by finding that it has the right and capacity to construe labor contracts citing as examples its involvement in determining whether a contract is a bar to a representation election, complies with union security limitations or violates Section 8(e). (R. 97) But, it does not observe that in each of those instances it has statutory standards upon which to base the construction of the agreement itself and that it is not there called upon to substitute its judgment for that of the parties or the express language of their agreement. The Board totally disregards the import of the language of the Act under which it exercises its jurisdiction as well as the legislative intent to keep the Board out of the area of interpreting, enforcing or administering collective bargaining agreements. The Board, instead, ventures into an area of self-expansion of its jurisdiction and usurpation of the collective bargaining function of the parties.

---

[9]A reserved right in the same sense and within the sphere indicated by this Court in the *Warrior & Gulf, supra*, decision wherein the Court quoted with approval from Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499 (1959). The Employer reserved for itself, with Union approval, a broad area of prerogative within the sphere of compulsory bargaining regulating "rates of pay and wages."

The Board further supports its determination of authority to construe and interpret a labor contract because the identical question is not pending before a civil court or an arbitrator. (R. 97) That argument loses sight of the fact that Congress did not choose to establish compulsory arbitration as the last step to resolving differences between parties in the administration of their collective bargaining agreements and in no event was the Board given such authority.[10] Whether or not this matter was pending before a civil court or an arbitrator is immaterial. The Board's so-called rule of comity in such situations is limited to circumstances in which either the court or the arbitrator is occupied in resolving an issue over which the Board also has jurisdiction under Section 10(a) of the Act.[11] Here, the Board seeks to reverse that rule when it has no statutory basis upon which to do so. In the instant proceeding, the Board reasons that since the matter could have been submitted to a Court, or to an arbitrator, but was not, it (the Board) then acquired jurisdiction. There is nothing

---

[10]It is clear that Congress did not intend to establish compulsory arbitration in any sense. See Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. 13-14; 93 Cong. Record 5297 (May 13, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, (U.S. Govt. Print. Off., 1948) 419-20; 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1520.

[11]Section 10(a) provides that the Board's authority *to prevent unfair labor practices* "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Thus, it has been held that the existence of an arbitration remedy under a contract cannot oust the Board of its jurisdiction to remedy an unfair labor practice. *National Labor Relations Board v. Wagner Iron Works*, 220 F. 2d 126 (CA 7, 1955), cert. denied 350 U. S. 981 (1956). The Board has adopted a rule of comity under which it will honor an arbitration award to which all parties agreed to be bound, the proceedings were "fair and regular" and the decision was not "clearly repugnant to the purposes of the Act." *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). See also *Raley's, Inc.*, 143 NLRB 256 (1963) and *Ramsey v. National Labor Relations Board*, 327 F. 2d 784 (CA 7, 1964)

in the statutory authority of the Board or in the deliberations of Congress which even remotely permits such a usurpation of authority by the Board.

Having crossed these tenuous gaps in its authority, the Board then deals with the two defenses it claims were raised by the Respondent Employer.[12] The first, it says, deals with the conduct of the parties in negotiations, finding that the conduct was not sufficiently precise when measured by its judgments to give rise to a "waiver" of a statutory right by the Union. The second, and actually the only defense raised by the Respondent Employer, was the specific language of the labor contract. The Respondent believes that in the absense of unquestioned ambiguity, the discussions of the parties normal to collective bargaining were merged into the agreement. Here the Board proceeds to ignore totally the fact that no employee will receive less than the contractually determined hourly rate of pay under any circumstances and that no employee is compelled at any time to meet the standards set by the premium pay plan either to retain his employee status or to receive the rate specified in the contract. Instead, the employees will receive a higher hourly rate of pay if they voluntarily attain a higher production standard. The Board ignores the common usage as evidenced by the dictionary meaning of the words involved. The Board even ignores one of its own unique reasonings applied in other cases contemporary to

---

[12]See note 6, *supra*, p. 29.

this matter.[13] Instead, the Board appears to reach out in its "expertise" to substitute its own judgment in finding that "such an intent is so contrary to labor relations experience that it should not be inferred * * *."[14] (R. 99)

---

[13]The Labor Board has developed a rather unique rationale in evaluating a refusal to bargain (Section 8(a) (5)) charge. It has held that in instances where an employer has subcontracted without notice to or consultation with the bargaining agent but "the subcontracting in question did not cause a *significant detriment* to the employees in the bargaining unit" such conduct was not violative of Section 8(a) (5) of the Act. *American Oil Co.*, 151 NLRB 421 (1965); *Kennecott Copper Corp.*, 148 NLRB 1653 (1964). The same reasoning is equally applicable to the matter at hand assuming *arguendo* that the Employer's conduct technically violated Section 8(a) (5) for there can be no showing that there has been a "significant detriment" to the employees in the bargaining unit.

[14]The House, in its deliberations which resulted in the present Labor Act, decried the alleged "expertness" of the Board. The House Conference Report observed: "As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* * * *." The Report continues: "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of Section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and Section 10(c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections *that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record*, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.* * * *" (Emphasis supplied) House Conference Report No. 510, 80th Cong., 1st Sess. 56, 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 560. Attention is directed to the parallel between that

(Continued on Page 34)

The Board is not filling a void in the law by its improper exercise of jurisdiction in a matter of this kind. Even prior to the current Labor Act, the Union would have had a remedy in State Law to obtain specific performance of the contract, sue for breach thereof, or obtain an injunction if the conduct of the Employer was causing irreparable harm or was not compensable with damages.[15] With the new Labor Act it also gained under Section 301 the right to obtain the review of the Federal Courts of its contractual dispute.[16] Nothing prevented the Union from proposing *ad hoc* arbitration and there is nothing in the record to indicate that the Employer would have opposed such a disposition of their argument. Of course, the Union also could have requested and obtained mediation.[17] Finally, the contract did not prevent either self-help or simply dropping the matter. Thus, the alternates to Board intervention were many. Several offered a conclusive and peaceful solution.

(Continued from Page 33)

which the Congress sought to thwart and that which the Board did here. In spite of the common usage of the terms involved as evidenced by their dictionary definitions, in spite of the area and industry practice and application given to comparable terms authenticating the Respondent Employer's application of the language involved and without any evidence or testimony to support its own view, the Board has, in fact, sought to substitute its questionable "Expertise" for the evidence and testimony in the record.

[15]*Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 57 Wash. 2d 95, 356 P. 2d 1 (1960) affmd 369 U.S. 95 (1962); *McCarroll v. Los Angeles Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322 (1957); *General Electric Co. v. United Auto Workers*, 93 Ohio App. 139, 108 N.E. 2d 211 (1952); *Springer v. Powder Power Tool Corp.*, 220 Ore. 102, 348 P. 2d 1112 (1960).

[16]*Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Dowd Box Co. v. Courtney, supra.*

[17]See Article VI, Section A of the Labor Agreement. (R. 65) Also, Sec. 203(c) of the Labor Management Relations Act, 1947, 29 U.S.C. 173(c).

The decision of the Board in this matter is a departure from a long standing line of cases, which go back to 1936, which state that it either does not have the authority to interpret, construe or administer labor agreements or that it will not ordinarily exercise its jurisdiction in such conflicts.[18] The departure can be closely associated with the change in personnel of the Board, not with any change in the law.[19]

Finally, it is important to observe that there was utterly no evidence of anti-union animus or bad faith on the part of the Respondent Employer. While this Court has held that such is not necessary to a finding of a Section 8(a)(5) unfair labor practice, its absence conclusively demonstrates that the matter was one of pure argument over the

---

[18] *Consumer's Research, Inc.*, 2 NLRB 57, 74 (1936) wherein the Board said: "The Board has no power under the Act to decide upon the subject matter or substantive terms of a union agreement." See also *Consolidated Aircraft Corp.*, 47 NLRB 694 (1943) in which the Board observed: "* * * it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. * * *" Affmd. *Consolidated Aircraft Corp. v. N.L.R.B.*, 144 F. 2d 785 (CA 9, 1944).

[19] The departure from past precedent appears to have been fashioned out of early dissents to the old rule written by recently appointed members of the Board. See *Hercules Motor Corp.*, 136 NLRB 1648 (1962) Cf. *Smith Cabinet Mfg. Co.*, 147 NLRB 1506 (1964).

application of a provision of the labor agreement.[20]

III. THE BOARD IS WITHOUT JURISDICTION TO ADMINISTER LABOR AGREEMENTS.

A. The Statutory Sanctions and Legislative History.

It is clear that Congress did not intend the National Labor Relations Board to be substituted for the Courts, voluntary arbitration or any other means that the parties voluntarily chose to resolve their differences once a collective bargaining agreement had been reached by the parties, as long as the conduct involved either in reaching the agreement or in meeting with regard to it thereafter was not a clear violation of Section 8 of the Act. This is evidenced by the language of the same Act which breathes life into the Board and determines its jurisdiction. This is buttressed by the legislative history of that Act, which conclusively shows a legislative intent not to empower the Board to function in the area of conflicts over interpretation of agreements or breaches of contracts. Specifically, reference is made to Sections 1, 8(a) and (d) and 9(a) and 10(a) of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat, 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) as well as Sections 201 (a), (b) and (c), 203 (d) 204 (a) and 301 (a) of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*)

20*National Labor Relations Board v. Katz*, 369 U.S. 736, 747-8 (1962) in which this Court noted: "It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of Sec. 8(a) (5), without also finding the employer guilty of overall subjective bad faith. *While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action*, no such case is presented here." (Emphasis supplied.) Cf. *Vickers, Inc.*, 153 NLRB No. 45 (1965) in which lack of anti-union animus or bad faith appears to be a controlling factor in finding absence of violation of Section 8(a) (5).

Section 10(a) of the National Labor Relations Act limits the Board to preventing any person from engaging in any unfair labor practice affecting commerce and confined those unfair labor practices to those *"listed in section 8."* Thus, if the conduct is not barred by "section 8" the Board is without jurisdiction. Those subsections alleged to have been violated by this Respondent Employer in the situation at hand are Sections 8(a) (1) and 8(a) (5). Section 8(a) (1) is routinely charged in all Board cases. The Board has gone so far in this respect as to already point in its prepared forms of Charge Against Employer that, among other sections, Section 8(a) (1) is violated. No time is spent on the 8(a) (1) aspect simply because there was no evidence of such in these proceedings and it can be fairly and readily assumed that the defeat of the 8(a) (5) charge will defeat the Board's entire case.

Section 8(a) (5) provides that an employer who refuses to bargain collectively with the representatives of his employees is engaged in an unfair labor practice. When applied to the case at hand, at no time has the Respondent Employer declined to meet and discuss fully the issue of its inauguration of a premium pay plan which was initially raised in these proceedings by the Union. The evidence is clear that the Union did not want to discuss the plan and made no effort to do so. It simply and unilaterally wanted the plan discontinued although the plan did not reduce the contractually required minimum rate of pay nor did it require any employee to do more work than he wanted to do. The thrust of the premium pay plan was to reward employees when they voluntarily chose to exert

the additional skill, special fitness, aptitude or the like necessary to qualify for the premium pay.

Section 8(a) (5) is simply a repetition of Section 8(5) of the original National Labor Relations (Wagner) Act. However, under the Wagner Act the concept "to bargain collectively" was not defined. It is defined in Section 8(d) of the present Act.

When the present Act was under consideration, both Houses of Congress were perturbed with the course that had been taken by the National Labor Relations Board under the original Act.[21] As a consequence, each House, in substantially similar terms, set out to define the terminology "to bargain collectively." Insofar as pertinent to the situation here before this Court, that definition provided,

---

[21]The House Committee on Education and Labor commented in its Report which accompanied H.R. 3020: " 'Bargain collectively' and 'collective bargaining': The present act does not define these most important terms. Some of the most glaring injustices of decisions of the present Board arise from that omission." The Committee then cites with approval the analysis of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937):

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine * * *'." The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel * * *."

The Report continues: "Notwithstanding this language of the Court, the present Board has gone very far, *in the guise of determining* whether or not employers had bargained in good faith, in *setting itself up as the judge of what concessions an employer must make* and of the proposals and counterproposals that he may or not make. * * *" (Emphasis supplied to demonstrate the parallel between the situation at that time which caused the Congress to curtail the Board, and the situation now in which the Board, in its decisions (without the full knowledge of the area and

(Continued on Page 39)

both in the Bill approved by the Committee and in the Bill passed by the House, as follows:

> "(11) The terms 'bargain collectively' and 'collective bargaining' as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements:
>
> "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure."[22]

Thus, applying the intent of the House, as shown by the above language, the most that could be required here is what has occurred, namely that the parties follow the procedure of their contract in an effort to resolve the dispute between them. This was done.

(Continued from Page 38)

industry), concludes: "Such an intent is so contrary to labor relations experience * * *" R. 99) The Report continues: "The Board has held it 'unfair' for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of 'collective litigation' like arbitration (citing cases). * * *" The Report concludes: "These cases show that *unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.* (See T. R. ISERMAN, INDUSTRIAL PEACE AND THE WAGNER ACT, McGraw-Hill Book Co., Inc., New York (1947), pp. 31-35; HAROLD W. METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT, the Brookings Institution (1945), p. 73)" House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess., pp. 19-20; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 310-11.

The Senate recognized the problem by also including in its original Committee Bill, and subsequent Bills, a provision defining the term "to bargain collectively," S. 1126, 80th Cong., 1st Sess. and H.R. 3020, 80th Cong., 1st Sess. as amended and passed by the Senate. (See 1 Legis. Hist. of the Labor Mgmt. Relations Act, 1947, 114-5, 242-3, 310-1, 430).

[22]Section 2 (11), H.R. 3020, 80th Cong., 1st Sess. (1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 36-40, 163-7).

The Senate definition, with modification, was ultimately accepted by the Conference Committee and the Congress following passage of two different Bills by each House of the Congress.[23] The Conference Report of the House Managers indicates that they believed the Senate definition to simply embellish their own concept, and supplemented their observations:

> "* * * One of the important changes in the inclusion of a provision indicating that the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.*"[24] (Emphasis supplied)

The foregoing, coupled with the articulateness of the many Senators and Representatives who wanted to prevent the Board from being overburdened with litigation, makes it extraordinarily clear that Congress did not intend the Board to embark on a program of interpreting or applying contracts.

The Senate, at the time it considered the Conference Committee Bill, was advised by Senator Taft, Senate Man-

---

[23]Section 8(d), S. 1126, 80th Cong., 1st Sess; Section 8(d), H.R. 3020, 80th Cong., 1st Sess. as it passed the Senate. (1 Legis. Hist. Labor Mgmt. Relations Act. 1947, 114-5, 242-4).

[24]House Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 35 (1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 539).

ager of the Conference, that while the Conference Committee Bill followed the Senate Bill in this regard, the Senate Conferees had declined to accept the definition of the House Bill chiefly because of its strike ballot requirement.[25]

The language of Section 8(d) of the Act itself makes it obvious that Congress did not have in mind that the Board should attempt to substitute its judgment for the judgment of the parties or that the Board was to interpret or construe the provisions of a labor agreement for the parties. First, the Section places upon the parties a mutual obligation to meet with each other at reasonable times and to confer in good faith "with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, *or any question arising thereunder*, • • • but such obligation does not compel either party to agree to a proposal or require the making of a concession: • • •" (Emphasis supplied.) Second, the Section states that once a collective-bargaining agreement is effective neither party may terminate or modify the contract without pursuing a given set of procedures, and states further: "• • • and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. • • •" This illustrates the intent of Congress that the parties, when they have once agreed to the contractual terms, are not to

---

[25] 93 Cong. Record 6601 (June 5, 1947), 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1541.

be considered obligated to revise those terms during the term of the contract. In the case at hand, the Union did not want to abide by the terms of the agreement it had entered into but sought to circumvent them by seeking the Employer to withhold its application of those terms and by seeking the aid of the Board in contending the Employer committed an unfair labor practice in applying those terms.

The intent of Congress that the Board was not to have the right to interpret collective bargaining agreements as a normal course of its responsibility or be involved in breach of labor contracts is further evidenced by the legislative history of the current Act. The original Bill before the Senate reported out by the Senate Committee on Labor and Public Welfare, and the Bill that ultimately passed the Senate, accepted a provision of an earlier Bill (S. 858, 80th Cong., 1st Sess.) which provided as Section 8(a) (6) as follows:

> "Section 8. (a) It shall be an unfair labor practice for an employer—
>
> "(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: *Provided*, that the Board may dismiss any charge made pursuant to this paragraph if the labor organization has violated the terms of such agreement or has failed to comply with an order of the Board."

In addition, that Bill also provided as Section 8(b) (5) as follows:

> "Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

"(5) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: *Provided*, that the Board may dismiss any charge made pursuant to this paragraph if the employer has violated the terms of such agreement or has failed to comply with an order of the Board."[26]

The thrust of these provisions was explained by their author, Senator Wayne Morse, who stated:

"• • • While it is my view that unions and employers should settle their contractual disputes by collective bargaining and voluntary arbitration, I recognize the force of the argument that existing law affords only nebulous remedies to employers as well as unions in case the other party has violated the contract. Should such a provision be adopted by the Congress it will be my hope that the Board would devise regulations and pursue a policy which would minimize the number of contract violation cases accepted under these proposals."[27]

Thus, it is quickly ascertainable that here was an attempt to place contractual matters under the jurisdiction of the Board, but with the further admonition that the Board should "minimize the number of contract violation cases accepted under these proposals."

Continuing, Senator Morse said:

"• • • I am seeking here to provide machinery and procedures whereby the National Labor Relations Board will have jurisdiction to take cognizance of charges filed by employers alleging the unfair labor

---

[26] S. 1126 as introduced by the Committee and H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 111, 114, 239, 241.

[27] 93 Cong. Record 1910 (March 10, 1947), 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 982.

practice of violating a contract. I think that will involve primarily a question of fact in both instances. Under my proposal, as I see it, it would become the duty of the Board to determine whether or not the parties have exhausted their remedies under their own contract, and, if they have not, they should be ordered to do so. * * *"

"It would be a great mistake for the Federal Government to undertake to adjudicate as unfair labor practices all alleged violations of collective bargaining contracts. Certainly this procedure should not be used until the parties have exhausted the remedies available under their contract or through voluntary arbitration."[28]

The Report of the Senate Committee on Labor and Public Welfare in reporting out S. 1126, with the "violation-of-contract" unfair labor practices sections included, noted:

"Section 8(a) (6): This amendment makes it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. Similar conduct on the part of a union is made an unfair labor practice in section 8(b) (5). While title III of the committee bill treats this subject by giving both parties rights to sue in the United States district court, the committee believes that such action should also be available before an administrative body. It is contemplated that the Board would devise regulations and pursue a policy which would minimize the number of contract violation cases accepted under this proposal. It would become the duty of the Board to determine whether the parties have exhausted their remedies under their own contract."[29]

---

[28]93 Cong. Record 1910-1911 (March 10, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 982-3.

[29]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. pp. 20-1; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 426-7.

The Report continued as follows in analyzing Section 8(b) (5) of S. 1126:

> "* * * The committee wishes to make it clear that by this provision and the provision making contract violations by employers unfair labor practices, it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. It is the purpose of this bill to encourage free collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available."[30]

Only the Senate Bill reported by the Committee on Labor and Public Welfare and the House Bill as amended and ultimately passed by the Senate included such a provision, making contract violations [redacted] unfair labor practices. No comparable provision was to be found in any of the House legislation on this subject. Both the

---

[30]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. pp. 22-3; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 430-1.

Senate and House Bills did include provisions to make the violation of contracts subject to prompt and speedy legal and equitable relief before the Courts, which was ultimately made manifest in Section 301. The foregoing analysis of that portion of the Senate Bills clearly illustrates the narrow area in which even the Senate was willing to permit the Labor Board to act in handling problems over contract administration. When it is realized that the Senate (and the House) ultimately discarded the proposed Sections 8(a) (6) and 8(b) (5) it is clear that neither branch of Congress intended that the Labor Board should be involved in contract administration or enforcement. In the present case, we see an apparent effort on the part of the Board, after years of quiescence in this area, to enlarge its jurisdiction.

Both Houses of Congress, however, did intend that their legislation would provide a means of relief for either party to a labor contract. Their intent was to provide the broadest form of relief, but not through the National Labor Relations Board. As a result, the House incorporated within its originally reported Bill, H. R. 3020, as Section 302(a), the following:

> "Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause."

When this portion of this Bill was considered by the House, the following colloquy occurred:

> "Mr. BARDEN. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.
>
> "It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.
>
> "MR. HARTLEY. The interpretation the gentleman has just given of that section is absolutely correct."[31]

The Senate included virtually identical provisions within Section 301 (Title III) of S. 1126 and H.R. 3020 as amended and passed. The Committee Report observes that "Title III gives labor unions the right to sue and be sued as legal entities for breach of contract in the Federal courts."[32] It also noted that:

> "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreements have become so numerous that it is

---

[31]93 Cong. Rec. 3734 (April 17, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 840.

[32]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 3; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 409.

not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill *proposes* to do in title I).[33] We feel that the aggrieved party should have the right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made' * * *."[34]

The Committee Report also observed:

"Section 301 is the only section contained in this title [title III]. It relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of section 8 of title I also dealing with breach of contracts. * * *"[35]

Senator James Murray in analyzing Sections 8(a) (6) and 8(b) (5) and Section 301 of S. 1126 made these observations:

"Finally sections 8(a) (6) and 8(b) (5) together with Section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective-bargaining agreements. Parties to such agreements have the choice of bringing their action before the Board or the United States district courts. Obviously the necessity for uniform decisions

---

[33]Emphasis supplied. This passage presupposes that without the proposed language (which was eventually omitted from the approved legislation) the Board would not have authority in contract administration.

[34]The Committee cited *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514 (1941). This extract taken from Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 15; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 421.

[35]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 30; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 436.

in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable."[35a]

As has already been noted, ultimately, when the National Labor Relations Act, as amended, was passed, the Senate discarded the provisions making violations of contracts an unfair labor practice while retaining substantially the equivalent of section 302 of the House Bill and section 301 of the Senate Bill.

All of the foregoing legislative history is tied together when it is observed that the Senate and the House dropped the added proposals of making contract violations and the violations of certain agreements unfair labor practices while retaining Section 301. The House Conference Report noted:

> "The Senate amendment contained a provision which does not appear in Section 8 of the existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.*[36] (Emphasis supplied.)

Senator Robert A. Taft, Manager of the Senate Conferees, in reporting the Conference Bill to the Senate concurred:

"When the bill passed the Senate it also contained a

[35a]93 Cong. Rec. 4153 (Apr. 25, 1947); 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1043. See also Min. Report No. 105, Pt. 2 on S. 1126, 80th Cong., 1st Sess. p. 13; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 475.

[36]House Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. pp. 41-2; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 545-6.

sixth paragraph in this subsection [Section 8] which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. *The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than the courts.* The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b) (5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective-bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions."[37] (Emphasis supplied).

Thus, Congress did not intend the Board to interpret, construe or administer collective bargaining agreements as a normal or usual practice. This is further borne out by Section 201 of the Labor Managements Relations Act. (See Appendix, *infra*, p. 80) There it is made exceedingly clear that the settlement of issues between employers and employees can best be accomplished through collective bargaining and such can be advanced by making governmental mediation facilities available. In Title II of the Labor Management Relations Act an independent agency, the Federal Mediation and Conciliation Service was established. Succinctly, in Section 203(d), the Congress stated:

---

[37] 93 Cong. Record 6600 (June 5, 1947); 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1539.

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

Nowhere within the framework of the statutory provisions declaring the policy of the United States or the functions of Federal Mediation is there found any reference either to the Board having authority in this area or suggesting resort to the Board to make determinations concerning the proper interpretation, construction or administration of a labor agreement.

While initially the Senate would have had the Board interpret and construe labor contracts as a normal activity by declaring that a breach of a labor contract was an unfair labor practice, it retreated from that position and joined with the House in not granting that authority to the Board. On the other hand, both Houses of Congress did contemplate through Section 301 that the Courts would have broad authority in this area so that parties to a collective bargaining agreement would be amply protected.

The foregoing also illustrates the Congressional intent to keep the administrative processes of the Board objective. While it is impossible to avoid political overtones in an appointive administrative agency, Congress sought to do so by the careful standards it established. The fact that matters of interpretation and application of labor contracts were removed from the Board's jurisdiction and awarded to the Courts is no mere accident. The Courts are renowned for their unbiased approach to the matters before them and

are made up of those highly skilled in dispensing justice without political coloration. To allow the Board to interpret labor contracts could permit political idealogy to be inserted at the heart of the ultimate objective of free and unfettered collective bargaining.

The legislative history and this legislation verifies the Congressional intent to minimize government intervention in collective bargaining. If there is any doubt, the Board's processes should not be imposed upon parties engaged in free and normal collective bargaining.

In a free society industrial conflict is inevitable. Congress recognized this fact and sought not to repress it but placed only a minimum of regulation upon it. Congress did not intend to impose solutions nor provide a basis for the Board to do so. It sought to promote collective bargaining not thwart it.

B. A Brief Reference To The Wagner Act.

The unfair labor practice specified in Section 8(a)(5) of the present Act is simply a repeat of Section 8(5) of the original National Labor Relations act.[37] The legislative history of that Act further supports the contention of the Respondent here. At the time S. 1958 was being considered by the 74th Congress, an amendment to Section 8(5) was proposed which read as follows:

"It shall be an unfair labor practice for either party to an agreement that has been registered pursuant to

---

[37] S. 1958, 74th Cong., 1st Sess. Ch. 372, July 5, 1935 (49 Stat. 449)

> Section 12 of this Act, to violate or to fail to observe any condition of such agreement."[38]

That proposal, including the accompanying amendment to Section 12 necessary to accomodate it, was not accepted. The debates indicate that Congress felt that this was going too far in the obligation to bargain collectively as provided for under Section 8(5) for there appears to have been no effort to provide substitute language or to argue that the foregoing was included in the language ultimately accepted in that Act.

As a consequence, neither the legislative history of the present Act nor its predecessor supports the reasoning of the Board offered in the matter at bar.

C. Collective Bargaining, The Ultimate Consummation of National Labor Policy, A Characteristic of Timber Products Industry and Respondent's Labor Contract.

The Board argument emphasizes the lack of an arbitration clause in the collective bargaining agreement here under consideration. This is not unusual in the timber products industry of the Pacific Northwest where the parties to a labor contract prefer to work out their own problems by the give and take of collective bargaining. As the U.S. Department of Labor noted in a recent study:

> "Five industries—tobacco, *lumber and wood products*, primary metals, transportation equipment, and con-

---

[38] I Legis. Hist. National Labor Relations Act 1935 (U.S. Govt. Print. Off., 1949) 1137. See also testimony of William H. Davis then Chairman, Special Committee on Government and Labor of the Twentieth Century Fund, Inc., later Chairman of the National Defense Mediation Board and first Chairman, National War Labor Board (World War II) II Legis. Hist. National Labor Relations Act 1935 2090-2109 at pp. 2101-2.

struction—accounted for over two-thirds of the agreements without provision for arbitration. * * *"[39] (Emphasis supplied.)

And, as pointed out by Benjamin Aaron in his discussion of arbitration on the west coast:

"* * * A typical agreement in the lumber industry, for example, provides for a five-step grievance procedure but *makes no reference to arbitration*. Reliance upon self-help rather than upon arbitration has been traditional in this industry. * * *. * * * Now the employers are said to be unwilling to abandon the traditional pattern of dispute settlement; at any rate, arbitration has not yet gained much of a footing in the industry."[40] (Emphasis supplied.)

The existence or lack of existence of arbitration as a last step to grievance procedures was not made a matter of evidence or testimony in these proceedings. However, if pertinent, it can be shown that no contracts in the timber products industry, including plywood manufacture, in the State of Montana include arbitration as the last step (or any step) in the resolution of grievances or any other difficulties. This is also generally true in the neighboring states of Idaho, Washington and Oregon, although on occasion arbitration is accepted on an *ad hoc* basis.

On the other hand, applying the reasoning of this Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960):

"Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. Sec. 173(d) states,

---

[39] U.S. Dept. of Labor Bulletin No. 1425-1 (1965) p. 56.

[40] Benjamin Aaron, *The Use of Arbitration*, 82 MONTHLY LABOR REV. (U.S. Dept. of Labor May, 1959) 543.

> *'Final adjustment by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *' That policy can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (Emphasis supplied.)

Thus, the fact that the parties here chose not to include arbitration within their collective bargaining agreement in no way detracts from the policy which can be effectuated *only* if the *means chosen by the parties* is given full play.[41]

D. Applicable Precedents Support Respondent's Thesis.

Respondent understands that this Court has before it the Brief of Respondent herein in Opposition to Petition for Certiorari in this matter. As a consequence, this Court's attention is respectfully invited to that portion of that Brief found at pages 16-22 thereof. Particular attention is directed to the point made by Justice Jackson speaking for a

---

[41]While the Respondent is not critical of arbitration of labor disputes when that means is selected by the parties, nothing in the history of federal labor policy indicates that the National Labor Relations Board is to statutorily substitute itself in labor disputes as an arbiter in the absence of an agreement providing for arbitration. As noted in n. 10, *supra*. p. 31 Congress did not intend to legislate compulsory arbitration in any sense. Even in its strong concern for the settlement of labor disputes creating national emergencies it declined the temptation to legislate compulsory arbitration. (Secs. 206-210, Labor Management Relations Act, 1947). Attention is also directed to the dissent that has developed questioning arbitration as the "ultimate" solution to labor disputes. See Paul R. Hays, LABOR ARBITRATION: A DISSENTING VIEW, Yale Press, New Haven, Conn., 1966; Francis A. O'Connell, Jr., WHAT'S WRONG WITH ARBITRATION, NAM Institute Monograph No. 364, 1966; and O'Connell, *The Duty to Bargain: Effect of Recent Decisions* 59 LRRM 58 (1965). Hays is a U. S. Court of Appeals Judge (CA 2) and an impartial arbiter of 23 years. O'Connell is a long time Director of Industrial Relations, Olin Mathieson Chemical Corp., New York, N.Y.

unanimous Court in *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943):

> "The Railway Labor Act like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them * * * So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. * * *"

The following statement of this Court in *National Labor Relations Board v. American National Insurance Co.* 343 U.S. 395, 404 (1952) is most pertinent:

> "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis supplied.)

The rule was stated thusly in *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93, 108 (1958):

> "* * * But the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. * * *"

Garner v. Teamsters Union, 346 U.S. 485, 490 (1953) made the point that the Board has responsibility for primary interpretation and application of the rules established

under the National Labor Relations Act. However, as this Court itself noted in *Dowd Box Co., Inc., v. Courtney*, 368 U.S. 502, 513 (1962) "Congress expressly rejected that policy with respect to collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

This view is also supported by decisions of the Courts of Appeal. Attention is especially directed to the Ninth Court of Appeals decision in *Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (1964) and the decision of Fifth Court of Appeals in *Sinclair Refining Co. v. National Labor Relations Board*, 306 F. 2d 569 (1962), both cited with approval in this case by the Ninth Court. [42]

E. The Board Caseload Already Overburdened.

The legislative history relating to the National Labor Relations Board is illustrative of the strong concern of Congress that the Board not be overburdened. This was shown in the discussion of the 1947 amendments to the National Labor Relations Act, *supra*, p. 40, 43-4. In Congressional debates leading to the passage of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401) Congress was concerned with the burgeoning caseload of the Board at that time and chose to permit the Board, by amendment of the National Labor Rela-

[42] Applicable decisions of other Courts of Appeal are found at pp 23-4 of Respondent's Brief in Opposition to the Petition herein.

tions Act, to delegate certain of the authority that it theretofore held to its Regional Directors.[43]

As a practical matter, however, the Board's caseload has not been lessening even today. Its most recent Annual Report indicates that during fiscal 1965 not only have the number of unfair labor practice cases filed with it risen but that refusal to bargain charges against employers were nearly 25 per cent more numerous than in the prior fiscal year.[44] While time has not permitted assembling proof, Respondent believes no small amount of the latter increase is the result of decisions of the Board comparable to its decision in this case. The Board's first quarterly report for calendar 1966 indicates that it received more petitions for representation elections than in any three month period in the Board's history.[45] To grant the Board's position in the matter at hand is certainly not going to improve either the Board's caseload nor the time involved to process these matters.

---

[43]S. 1555, 86th Cong., 1st Sess., Pub. Law 86-257, Title VII, Sec. 701 (b) amending Sec. 3(b) of the National Labor Relations Act, as amended. See also S. Rept. No. 187, 86th Cong., 1st Sess. on S. 1555 at pp. 26, 35-36, 73-74, 102, 119 (I Legis. Hist. Labor-Mgmt Repting and Discl. Act of 1959 (U.S. Govt. Print. Off. 1959) 422, 431-2, 469-70, 498, 515). House Rept. No. 741, 86th Cong., 1st Sess. on H.R. 8342 at pp. 18, 24 (I Legis. Hist. Labor-Mgmt Repting and Discl. Act of 1959, 776, 782.)

[44]Thirtieth Annual Report of the National Labor Relations Board (U.S. Govt Print. Off. 1966) p. 7 noting a new record of unfair labor practices charged as well as a new record in refusal-to-bargain charges.

[45]*Report of National Labor Relations Board*, First Quarter 1966, Release S-111, May 24, 1966. The Board's Report for Second Quarter 1966, Release S-112, Sept. 5, 1966 indicates a high total of 4317 unfair labor practice charges filed. On June 30, 1966 9394 cases of all types (6654 were unfair labor practice matters) were pending disposition at various procedural levels as compared to 8884 a year earlier (5731 of which were unfair labor practice matters.)

F. Other Considerations.

The fact that the contractural provision relied upon arguably covers the situation to which the Respondent Employer sought to apply it, in the absence of any bad faith or anti-union animus, should be sufficient to support the view that the Board is without jurisdiction to enter into the interpretation of the labor agreement. That there was no showing of an effort to undermine the Union is an important consideration supporting the Respondent's viewpoint herein.[46]

Prominent labor law authorities agree that the National Labor Relations Board should not intervene in any issue of contract interpretation which is cognizable under the grievance or arbitration provisions of an agreement where the disposition of the contract issue will resolve the unfair labor practice issue or avoid the necessity for facing an unfair labor practice issue.[47] As stated by Dunau in his article on

---

[46]Werne, 1 LAW AND PRACTICE OF THE LABOR CONTRACT (Callighan & Co., Chicago, 1957) 1964 Cum. Supp. Sec. 7.150, p.98 observes: "* * * Where there is an alleged breach of contract terms, the National Labor Relations Board is not the proper forum for seeking a remedy unless the employer is motivated by union animus or is acting in bad faith."

[47]See Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?* 10 Labor Law Journal 477, July, 1959. See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 14 Labor Law Journal 1016, December, 1963. A recent case note in 16 Stanford L. Rev. 456, 460 observes "* * * the Board should be less eager to invalidate a contract clause since it thereby interferes with the freedom of the bargaining process." Bowman, *An Employer's Unilateral Action-An Unfair Labor Practice?* 9 Vanderbilt L. Rev. 487, 520 under the heading "Collective Bargaining Agreements and Unilateral action" observes: "If the employer simply failed to comply with his contractual obligations, there might be a private action for damages, but the Board would not become involved unless there appeared to be a conscious campaign to undermine the union." The author recommends that the Board should avoid interpreting labor contracts as often as possible "as it appears to have done at times in the past." (n. 132 at p. 521)

Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52, 65:

"Three convergent elements of the statutory scheme are relevant to the question whether enforceable contractual prohibition of unfair labor practices is compatible with the NLRA. * * * The last of the three relevant elements is the fact that the breach of a collective bargaining agreement is not per se an unfair labor practice. The remedy for a breach does not lie with the NLRB. Depending on the context, the remedy is to be sought either in the grievance and arbitration procedures of the contract, in conventional litigation, or in self-help. *The import of this last element is that the administration of a collective bargaining agreement—its interpretation, application, and enforcement—is not a function of the NLRB.* It would seem therefor that the more closely the contractual prohibition of unfair labor practices ties into the administration of an agreement the more fitting it is to recognize it as being within the province of an arbitrator or court. * * *" (Emphasis supplied.)

At pp. 73-4 the author points out:

"* * * If the action is one for which the agreement provides a valid standard of conduct, the preliminary question is also the only question presented. The dispute within this frame of reference is referable *solely* to the agreement for solution in at least three situations: (1) The action taken by the employer is within the scope of a subject regulated in terms by the agreement; the employer claims that what it has done complies with the agreement, and the union asserts a conflict. * * * (3) An agreement may, expressly or impliedly, confer upon the employer the power to take unilateral action—that is, to alter the status quo without advance notification of or consultation with the union—with respect to a particular subject or subjects. If it does, the employer takes unilateral action in reliance on the committal of the matter to his discretion, the only question presented is whether the action taken

is within the confines of the conferred power.

"The upshot is that only if the action taken by the employer is not regulated by the agreement, either by permitting it or by prohibiting it, is there an occasion during the term of a collective bargaining agreement for application of the statutory principle forbidding the alteration of existing employment terms without bargaining. * * *" (Emphasis supplied.)

To look at this matter from still another point of view, the parties satisfied their "public" obligation by reducing the results of their negotiations to an agreement. The argument over whether or not the agreement serves the purpose to which it was put is a "private" matter, not within the jurisdiction of the Board unless it can be shown that the employer engaged in a course of conduct tantamount to exceeding bad faith or anti-animus.

Finally, the Court's attention is directed to its own pronouncement in *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103-4 (1962):

"* * * The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation would tend to stimulate and prolong disputes as to its interpretation."

Since Congress established, through Section 301, its intent to have disputes involving contractual administration and interpretation submitted to the Courts, it does not appear in the interests of the public policy enunciated by this Court in the *Lucas Flour* case to permit the Board one standard of interpretation and the Courts another. The Board here sought to place a very strained interpretation upon the contractual language. It supposed that premium pay plans involving production incentives were inimical to Union standards. As the Court said in *National Labor Relations Board v. Nash-Finch Co.*, 211 F. 2d 622, 627 (CA 8, 1954):

> "It seems to us that what the Board has done, under the guise of remedying unfair labor practices is to attempt to bestow * * * benefits which it believes the Union should have obtained but failed to obtain * * * as a result of its collective bargaining with the respondent. * * *"

The Board asserts that premium and incentive rates are simply not generally recognized or readily accepted by unions and therefore cannot be implied absent extremely clear contractual language. The Board is wrong. The contractual language here is clear. Secondly, attention is directed to any number of arbitration cases which are based upon the application of premium or incentive pay indicating that such plans are widespread among employers and

unions nationally.[48]

IV. BOARD'S CONTRACTURAL INTERPRETATION IS NOT VALID. RESPONDENT REASONABLY RELIED ON WORKING AGREEMENT.

The following discourse illustrates two facets of this matter. (1) The interpretation provided by the Board is clearly unreasonable and wrong. If the Board has the right to interpret a labor contract where the threshold question to an alleged unfair labor practice is a contractual interpretation, such an interpretation must be reasonable and not as tenuous as the one it provided in this matter. (2) The Respondent's interpretation made of the provision here involved is no less than arguably or colorably applicable, which should prevent the Board from arguing that the Respondent's defense is so unreasonable as to be asserted spuriously and thus ignored.

---

[48]See *United States Steel Corp.*, 44 L.A. 774 (1965); *Metal Textile Corp.*, 24 L.A. 726 (1955); *Bethlehem Steel Co.*, 21 L.A. 614 (1953); *Sangamo Electric Co.*, 20 L.A. 639 (1953); *Parke Davis & Co.*, 17 L.A. 568 (1951); *National Lock Co.*, 15 L.A. 945 (1951); *Union Starch & Refining Co.*, 15 L.A. 4 (1950). The Board in its Brief (n. 20, pp. 28-9) frowns upon the well known and established rule preserving unto management all "residual rights" which are not expressly taken away from it in the bargaining agreement. See the discussion of the American Bar Association Section on Labor Relations Law, Committtee on Arbitration and Collective Bargaining Agreements, 1966 Committee Reports at pp. 114-116. This portion of the report was adopted by the majority of the Committee and is supported by the decision of this Court in *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 583 (1960) which declared: "Collective bargaining agreements regulate and restrict the exercise of management functions; they do not oust management from performance of them. Management hires, fires, and pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. * * *"

A. Section A, Article XVII of Working Agreement.

"The employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like."

The respondent, in good faith, relied upon that language for the establishment and maintenance of the Glue Spreader Premium Pay plan. The rate paid is a premium rate provided for the employees who possess and expend the special fitness, skill, aptitude and the like which in turn is evidenced by the spreader crew in which they are involved exceeding a given quantity of production subject to certain quality controls. While a lack or lack of application of the special fitness, skill, aptitude or the like will nevertheless earn the basic rates provided by the labor contract, the possession and application of a special fitness, skill, aptitude or the like will provide a premium rate of pay.

In any production type operation a special fitness, skill, aptitude and the like is, of necessity, dependent upon outside factors as well as these qualities of the employee himself. The fact that a plan is partially dependent upon a particular employee's fitness and aptitude to coordinate his skills and other fitnesses and aptitudes to others closely related to him in his work activities is but a part of the overall special fitness, skill, aptitude or the like required of him. It is no less a premium pay plan that rewards a particular employee whether it is one in which he alone receives the reward or one in which others may receive a comparable reward in consequence of a harmonious intermeshing of their special fitnesses, skills, aptitudes or the like. The ultimate

reward in either case will be made to a particular employee when the premium is not placed into a pool of some sort and then divided among several employees which it is not in the matter before this Court.

B. Definition of Terms.

> "There is nothing surprising in the Statement that evidence of usage is admissible in the process of interpretation of the words of any contract, or of any other symbols or expressions. How else is interpretation possible? It is usage alone that gives meaning to any word or symbol. An appeal to a dictionary for aid in interpretation is an appeal to recorded usage—or rather, to recorded usages. The better the dictionary, the more varied and numerous are the usages it records. * * *"
> 3 CORBIN ON CONTRACTS (1960 ed.) Sec. 555, p. 228.
> "A reasonable degree of certainty is attained if words are interpreted according to a standard not peculiar to the parties, but customary among persons of their kind under the existing circumstances." 4 WILLISTON ON CONTRACTS (3rd Ed., 1961) Sec. 608, p. 391.

WEBSTER'S NEW INTERNATIONAL DICTIONARY, Second Edition, Unabridged, 1953, (except as otherwise noted) provides the following definitions of the pertinent terms:

Premium in its industrial relations sense is defined in the sense that it is used here as "an additional wage given a worker *for production above a specified amount.*" (Emphasis supplied). WEBSTER recognizes the *premium system* of wage payment and distinguishes between named systems. The explanation given *premium system* is "a system for paying workmen in which the workman's hourly rate is guaranteed and a premium, usually a percentage of his hourly wage, is paid for doing the work in less than the standard time specified." WEBSTER distinguishes then be-

tween the Halsey and Rowan systems as follows: "In the Halsey *premium system* no limit is set to the amount the workman can earn. In the Rowan *premium system* the maximum a workman can earn is double his hourly rate." This explanation makes it clear that the language used by the parties in their Working Agreement contemplated a plan such as the Respondent here initiated for the glue spreader crews.

In Johnson v. Fuller and Johnson Mfg. Co., 183 Wis. 68, 197 N.W. 241, 245 (1924) the Court took note of a premium system in the pay of employees and described it as follows:

> "• • • By the establishment of a premium system an employer held out to the employee an inducement for extraordinary effort. No obligation rested upon any employee, under his contract, to earn a premium. If he performed the duties of the ordinary skillful and diligent employee, the premium did not accrue. On the other hand, if he exerted himself and performed extraordinary services which resulted in his finishing a certain job during a period which was less than the time consumed in the activities of an ordinary employee, he created something of value for the employer. • • •"

In Brown v. Board of Police Commissioners, 58 Cal. App. 2d 473, 136 P. 2d 617, 619 (1943) the Court said: "A premium is a reward or recompense for some act done." Accord: *Hankins v. Ottinger*, 115 Cal. 454, 47 P. 254 (1896).

Fitness is defined by WEBSTER as a "state or quality of being fit or fitted;" "appropriateness or adaptations;" and "mutual adaptation in things associated by nature or art; adjustment; also, an instance of this." *Fit* is defined as "the

quality, state, or manner of being fitted; adjustment; adaptedness. * * *" The term contemplates an adaptation as with other people or things. Thus, the fact that several workmen work in association with each other and are jointly involved in the effort does not destroy the intent of the term *fitness* since the term in one context clearly contemplates the ability to adapt into a situation in association with others.

The Court in *People v. Knauber*, 27 Misc. Rep. 253, 57 N.Y.S. 782, 783 (1899) took note of the definition of *fitness*:

> "'Fitness' is defined by the American Encyclopedia Dictionary so far as is applicable, as follows: '(1) The quality or state of being fit, suitable, or adaptedness. (2) Serviceableness; use; utility.'" * * * "'Fitness' means the quality of being suitable and adapted to the performance of those duties. This in some cases obviously includes habits, industry, energy, ambition, tact, disposition, knowledge of human nature, discretion, shrewdness, suitable physical presence, etc.—matters which require an examination of a very different character from that which may test the competency, excellency, and worth of a candidate. A man may be of great mental competency, moral excellence, and worth, and yet possess very little adaptation for the performance of the duties of the office, because lacking in one or more of the qualities mentioned above under the term 'fitness.' * * *"

Skill is defined by WEBSTER as "the ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency;" "a particular art or science; now usually, a power or habit of doing a par-

ticular thing competently; a developed or acquired aptitude or ability; an accomplishment."

BLACK'S LAW DICTIONARY (4th Edition, 1951) at page 1558 defines *skill* as:

> "Practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity."

Aptitude is defined by WEBSTER as "readiness in learning; aptness." It is also defined as "general fitness or suitableness; appropriateness;" "natural disposition or tendency to a particular action or effect;" and, "natural or acquired capacity or ability; talent."

The like is defined as "something similar or of the same kind; anything having a resemblance; as, butter, cheese, and the like."

And the like stated after specific terms is meant to give an extension to those words. Such was held in *Diamond State Iron Co. v. Giles*, 7 Houst. 557, 11 Atl. 189, 195 (Del. 1887) where the Court interpreted "the outside walls of the buildings having trussed roofs, such as churches, public halls, theaters, restaurants, and the like * * *." The words "and the like" were held "to give extension of the uses to which buildings have trussed roofing may be properly applied."

An examination of the various functions performed by the employees on the glue spreader crew, clearly substan-

tiates that special skills, aptitudes, fitnesses, or the like are essential to qualify for the premium pay.

The language "to reward a particular employee" in no way detracts from the interpretation of this provision by the Respondent. The premium provided for here is ultimately only paid to a single employee. As has been observed, the rates of pay contractually established varied between the various jobs of the glue spreader crew. The Core Layer, assuming he performed in a manner which did not result in a premium, received the contractual rate of $2.29 per hour. The premium held out to him was 21 cents per hour. On the other hand, the premium held out to the Core Feeder was 26 cents per hour and the premium held out to a Sheet Turner was 35 cents per hour. The fact that the special fitness, skill, aptitude and the like required of each employee included a degree of interdependence does not detract from the fact that the employee involved was required to use "some special fitness, skill, aptitude and the like" and that the ultimate premium earned was paid to a "particular employee." Seldom will any premium in any manufacturing operation be wholly dependent on but one employee alone. There is real doubt that any sound premium pay plan could be developed for the glue spreader crew which did not accommodate their functional interrelationship.

An evaluation of the foregoing dictionary definitions, the interpretations placed on the words by the Courts, and the terms used in the Working Agreement pertaining to premium pay clearly support the position that the Respondent acted in good faith and had every reason to believe that

the plan initiated by it was permissible under this contract language.

C. Area Custom and Practice under Related Circumstances.

"It is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary." *Hostetter v. Park*, 137 U.S. 30, 40, (1890).

"Nevertheless, it is the circumstances that surrounded and could have affected the party to the contract that are relevant to the issue, * * *" 3 CORBIN ON CONTRACTS (1960 Ed.) Sec. 536, p. 35.[49]

Custom and practice are constantly relied upon to determine the intent of contractual terms.[50] In the case at hand, the Business Agent who, as the Union's representative, negotiated the agreement now under consideration is also the Business Agent administering the labor contract at the Mount Lolo Lumber Company at Missoula, Montana. (R. 8, 15, 57) The Mount Lolo agreement includes language which is almost identical to that found in the present contract as follows:

"Nothing in this agreement shall be construed as to prevent the Employer from voluntarily advancing any wage rate or scale; *but the advance of any individual rate or scale to reward a particular employee for some special fitness, skill, aptitude, or the like,* shall not be considered a permanent increase in the rate or scale of that position after it has been vacated by a particular individual to whom the increase was granted." (Emphasis supplied. R. 57)

---

[49] Such a premise was accepted by this Court in the *Warrior & Gulf* decision, 363 U.S. 574, 578-9 (1960). See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002-1005.

[50] 5 WILLISTON ON CONTRACTS, (3rd Ed., 1961) Secs. 648-662, pp. 1-122.

Under that language a premium pay plan was developed whereby crews, made up of two men, are paid a premium when they exceed a given weekly norm of lumber footage loaded into railroad cars. The premium there is also dependent on outside circumstances. The Company employs, one, two and occasionally three such crews. By its employment of more than one crew at a time, and with plant production relatively constant, it is possible that none of the crews may attain the premium. The quantity loaded is not only dependent upon production but also upon the plant transportation system bringing necessary materials to load.

The Stoltze Land & Lumber Company contract with a sister union of the one here involved, also administered by the same Business Agent common to Mount Lolo and Respondent, further illustrates the custom and usage of similar language in the area. That agreement states:

> "Nothing in this agreement shall be construed as to prevent the Employer from paying a premium rate in excess of the agreed upon minimum scale to reward special fitness, skill, aptitude or the like." (R. 59)

Under that agreement the head sawyer is paid a premium of 25¢ an hour, if the plant exceeds an average 80,000 board feet of lumber cut per day measured on a monthly basis. The premium, while paid to an individual employee, is dependent upon the activities of employees who work in conjunction with the head sawyer in the balance of the sawmill operation as well as the Company log supply.

These examples illustrate that the use of the language involved here is not restricted to the activities of a single

employee in isolation from all other employees. These applications of the language here were made known to Mr. Thomason by Mr. Bright prior to the March 12 negotiating meeting. (R. 46, 53-55) These applications were discussed in the presence of the Union in the negotiating meetings that led up to the contract that was executed. (R. 55)[51]

D. Union Was on Notice as to Purpose to which Contract Provision Would Be Put.

The Union representatives were advised of the Respondent's contemplated installation of a premium pay plan under Section A of Article XVII. Mr. Bright was present during negotiations held under the chairmanship of Federal Mediator Clavadetscher and made notes at the time of the discussions with the Union. His notes show the following with specific reference to the matter at hand:

> "Union and company jointly 5 P. M.
>
> "Clavadetscher: Union will recommend a dated union shop and make a provision for students and incorporate present rates in effect on spreader crews.
>
> "Company position unchanged. Company is working on an incentive plan for spreader crews under premium clause.
>
> "Weller[52] was insistent on union shop. Meeting recessed subject to call of either party through F. M. & C. S. or by call of F. M. & C.

---

[51] "An important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves." 4 WILLISTON ON CONTRACTS, (3rd Ed., 1961) Sec. 623 p. 789.

[52] Refers to Robert C. Weller, Union Business Agent and Chief Negotiator.

"Recessed 5:10 P.M." (R. 56)[53]

The portion of the meeting above recorded lasted just 15 minutes. The notes make it clear that the parties were meeting jointly. Federal Mediator Clavadetscher outlined what he understood to be the Union proposal to resolve the two remaining issues. Mr. Bright, as one of the two representatives of the Respondent, (with Mr. Thomason), noted the Respondent's response as succinctly as it could have been noted.

Since the notes were made *at the time* there is absolutely no reason to believe that the Company representatives who said they were working on an incentive plan, did not go on to mention that it was to be under the premium clause. The notes were recorded to maintain an accurate record of the progress and status of negotiations. The notes presumptively would be more accurate than anyone's recollection since more than seven months elapsed between the March 12 meeting and the October 16 hearing before the Trial Examiner. Because the notes were made at the time of the occurrence of the event, their reliability is far superior evidence.

While the Union representatives appear to have a slightly different recollection of this advice that an incentive premium plan was contemplated, they do acknowl-

[53]Written memoranda made at the time of a transaction may be considered a part of the *res gestae* and evidence of the fact. *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 296, 125 P. 242 (1912) A memorandum made at the time of the transaction and used to corroborate testimony was considered proper and effective even though the witness had no definite recollection in *Nelson & Wallace v. Gibson*, 90 Vt. 423, 98 Atl. 1006 (1916). See also, *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314 (CA 6, 1894).

edge that the Respondent did communicate to them that it had such a plan in mind at the March 12 negotiating meeting. (R. 12-13). The Union representatives did not voice an objection. They also recall a discussion of premium pay plans in other meetings.

As a consequence of these various factors it is clear that the Respondent had a reasonable basis upon which to interpret the language of the contract involved to apply to the premium pay plan that it established and maintained. It is further evident that the Respondent did so in complete good faith.

E. Portion of Agreement Relied on was Union Waiver of Rights to Bargain.

The Board seems quite concerned that the language involved is not a waiver in terms considered acceptable to it. The Respondent believes that whether or not this is a waiver is actually quite immaterial. On the other hand, if the language involved is anything, it is a reservation of a right as distinguished from a waiver. To apply the Board's reasoning, every right set forth in a labor contract is in one sense or another a "waiver" of the right of either party to bargain on wages, rates of pay, hours and conditions of employment. Under such circumstances, every provision of every contract would receive the scrutiny of the Board were the Union to find the floodgates of litigation opened for them by this Court's acceptance the Board's reasoning. By the very fact that the Board seeks to determine whether or not a "waiver" exists, it injects itself into contract administration and interpretation situations when such intrusion is otherwise unwarranted. The Board, in substance, substi-

tutes its judgment for the agreement of the parties so that it nullifies that agreement. Collective bargaining will be fettered, if not hamstrung under such circumstances.

The First Court of Appeals declined to accept the Board's definition of a waiver in *National Labor Relations Board v. Perkins Machine Co.*, 326 F. 2d 488, 489 (1964) in the following language:

> "We could not agree with the seeming suggestion in that opinion that the parole evidence rule required the waiver to be contained within the four corners of the written agreement."

If the principle of a waiver is necessary to a determination of the merits of this matter, there can be no doubt that all of the elements are present.[54]

---

[54] "Waiver is defined in the Restatement of the Law of Contracts p. 400, Sec. 297, comment b, as 'the voluntary relinquishment of a known right.'

"In 67 C.J. 299, Sec. 3, we find the following statement: "To constitute waiver there must be, generally, first, an existing right, benefit, or advantage; secondly, knowledge, *actual or constructive*, of the existence of such right, benefit, or advantage; and, lastly, an actual intention to relinquish it, *or such conduct as warrants an inference of* relinquishment.' *Constantino v. Moreschi*, 9 Wash. 2d 638, 115 P. 2d 955, 961 (1941).

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party and does not require or depend upon a new contract, new consideration or an estoppel. It cannot be recalled or expunged . . . *A waiver may be either verbal or in writing; and it is not necessary that the waiver should be direct and positive. It may result from implication and usage*, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. The assent must, however, be clearly established and will not be inferred from doubtful or equivocal acts or language." *Carfi v. DeMartino*, 181 Misc. 428, 46 N.Y.S. 2d 134, 137 (1944) quoted at 5 WILLISTON ON CONTRACTS (3rd Ed., 1961) Sec. 678, pp. 239-40. (Emphasis supplied.)

The right waived was the right to require the Respondent to bargain with the Union prior to the institution of a premium pay plan. The parties are aware of that right inasmuch as they chose to include specific language in their Working Agreement to waive that right. (Section A, Article XVII.) The intention to relinquish it is also found in the language used. However, if that is not sufficient in itself, further evidence is supplied by the use of that language by the here complaining party in other agreements with other employers in the area.

V. BOARD HAS NOT SUSTAINED ITS BURDEN OF PROOF.

The legislative history of the Act here involved demonstrates the concern of Congress that the Board should not substitute its alleged expertness for evidence in the record of proceedings.[55] If the Board, therefore, believed that the Union here did not intend the consequences normally flowing from its consummated action, such evidence, if otherwise deemed proper, should have been presented in the hearing of this matter. But none was presented. The evidence in the record clearly supports the Respondent Employer's contractual interpretation. It does not even remotely support the Board interpretation. The Board's decision relies on: (1) its evaluation of the parties conduct prior to the consummated agreement. But, in fact, the agreement is supposed to have merged into it the prior discussions of the parties so that those discussions are actually no longer important, unless an ambiguity exists and none is believed to exist. (2) The Board asserts a conclusion

---

[55]See n. 14, p. 33 *supra* and n. 21, p. 38 *supra*.

upon which no evidence is introduced into the record which will support that conclusion; namely that, in the Board's opinion, the Employer viewpoint is "so contrary to labor relations experience" that it is unacceptable. Nevertheless, there is no evidence in the record to support that conclusion. Instead, the evidence points to conversations prior to the ultimately signed agreement indicating the announced intended utilization of the language agreed upon. The evidence also demonstrates substantially identical application of comparable language in the timber products industry of the area. That practice is shown to exist in plants wherein the Union is represented by the same Business Agent. Finally, the contractual language itself is clearly susceptible to the application made of it.

The foregoing manifests the fact that the Board went outside of the evidence before it on the one hand and on the other hand ruled improperly in the face of the directive of Congress in modifying Sections 10(b), (c) and (e) of the Act to prevent the Board from imposing an expertness it does not have upon the litigants before it. (See Appendix at pp. 79)

The thrust of this argument is that the Board had the burden of proof.[56] That burden has neither been carried nor shifted from it in this case.

---

[56]RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, NATIONAL LABOR RELATIONS BOARD, Series 8, Revised January 1, 1965 (U.S. Govt Print. Off. 1965) Sec. 101.10(b) p. 60; 29 C.F.R. Sec. 101.10(b); *National Labor Relations Board v. Sebastopol Apple Growers Union*, 269 F.2d 705, (CA 9, 1959) wherein the Court said: "* * * The burden was on the General Counsel to establish the unlawfulness of respondent's actions, not upon the respondent to establish its actions were lawful."

The Courts have every right to set aside a Board decision when evidence supporting that decision is not substantial. The decision of this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951) is controlling. There this Court said:

> "• • • Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Continuing, the Court also stated:

> "• • • The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. • • •"

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals of the Ninth Circuit is correct and should be affirmed. This matter should be remanded to the Board to vacate its Decision and Order and to dismiss the Complaint on file herein.

Respectfully submitted,

GEORGE J. TICHY
Counsel for Respondent

October 15, 1966

APPENDIX

In addition to the provisions of the National Labor Relations Act. (49 Stat. 499), as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. 151, *et. seq.*), cited in the Appendix of the Board's Brief (at pp. 31-34) the following excerpts from that Act are also deemed relevant:

Sec. 1 * * *It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * *

Sec. 10(b) * * * [Referring to proceedings before the Board] Any such proceedings shall, so far as practicable, be conducted in accordance with the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * *

Sec. 10(c) * * * If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order * * *. [also] * * * If

upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * *

Sec. 10(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

In addition to the provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) cited in the Appendix of the Board's Brief (at p. 34) the following provisions are also deemed relevant:

Sec. 201 That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the rep-

resentatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

• • •

Sec. 203(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

• • •

Sec. 204 (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a duspute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

• • • • •